MOTION FILED

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In the

Supreme Court of the United States

OCTOBER TERM, 1975

No. 73-7031

JESSE THURMAN FOWLER,

Petitioner,

vs.

NORTH CAROLINA,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE AND BRIEF OF AMICI CURIAE

Submitted By

American Ethical Union,
American Friends Service Committee,
Board of Church and Society of the United Methodist Church,
Center for Social Action of the United Church of Christ,
Church of the Brethren,
Commission on Social Action of Reform Judaism:
- Union of American Hebrew Congregations,
- Central Conference of American Rabbis,
- National Federation of Temple Sisterhoods,
- National Federation of Temple Brotherhoods,
- National Federation of Temple Youth,

Division for Mission in North America of the Lutheran Church in America,
National Catholic Conference for Interracial Justice,
National Coalition of American Nuns,
National Council of the Churches of Christ in the U.S.A., Division of Church and Society,
The Leadership Conference of Women's Religious,
The United Presbyterian Church in the United States of America.

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The above religious organizations by their attorneys, Elmer Gertz and Willard J. Lassers, move for leave to file a brief *amici curiae* in support of petitioner.

In support of this motion the religious organizations represent as follows:

The legal arguments on behalf of petitioner will be presented by his counsel. There are, however, a number of ethical considerations of deep concern to the religious organizations. Most of these organizations formally have taken stands in opposition to capital punishment.[1]

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[1] The statements appear in the appendix to the amicus brief filed on behalf of the American Friends Service Committee, et al, in *Witherspoon* v. *Illinois*, O.T. 1967, No.

They desire to present a point of view somewhat different from that of petitioner, which they think will contribute to a more complete understanding of the case. Hence, they ask leave to file this brief.

These organizations have a total membership exceeding 26,500,000. They are:

1. AMERICAN ETHICAL UNION

The American Ethical Union is a federation of the Ethical Culture Societies and Fellowships in the United States, which, collectively, constitute a liberal religious humanist fellowship known as the "Ethical Movement" or the "Ethical Culture Movement."

The first Ethical Culture Society was founded in New York City in 1876 by Dr. Felix Adler. There are today 24 Societies and Fellowships of the American Ethical Union in ten states and the District of Columbia. The American Ethical Union is a member of the International Humanist and Ethical Union, a world-wide organization, with headquarters in Utrecht, The Netherlands. Religious humanists oppose the death penalty. The American Ethical Union has adopted policy statements calling for its abolition, and Members and Leaders (Ministers) of Ethical Culture Societies have been active and, in many instances, in the forefront of original efforts to have the death penalty abolished throughout the United States.

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[1] (Continued)

1015. Substantially every major denomination has expressed its opposition to the death penalty. The statements appear in the *Witherspoon* brief.

2. AMERICAN FRIENDS SERVICE COMMITTEE

The American Friends Service Committee has, since 1917, engaged in religious, charitable, social, philanthropic and relief work on behalf of the several branches and divisions of the Religious Society of Friends in America. There are approximately 123,000 Friends in the United States. The American Friends Service Committee, although it cannot speak for all Friends, has a vital interest in this litigation because of Friends' historic and continued opposition to the taking of human life by the State. Such opposition to capital punishment goes back more than 300 years, to the beginning of the Quaker movement and stems from Quaker belief that there is an element of the divine in every man.

3. BOARD OF CHURCH AND SOCIETY OF THE UNITED METHODIST CHURCH

The Board of Church and Society is an instrumentality of the United Methodist Church. Its purpose is to further the works of the church in the sphere of social affairs. The United Methodist Church at its 1960 General Conference adopted a statement opposing the death penalty. The statement was revised in 1964 and is now part of United Methodist Social Policy. The United Methodists number 11,000,000 members among their 38,000 churches which are situated in every state.

4. CENTER FOR SOCIAL ACTION OF THE UNITED CHURCH OF CHRIST

The Center for Social Action is an instrumentality of the United Church of Christ devoted to promoting education and action in international, political and economic affairs. The Center stated its position in opposition to

capital punishment in a policy statement of January 30, 1962. The United Church of Christ has over 2,000,000 adherents.

5. CHURCH OF THE BRETHREN

The Church of the Brethren General Board is the administrative arm of the Church of the Brethren. It carries out policies adopted by the church's legislative arm—Annual Conference—in the areas of world ministries, parish ministries and general services. Among its world ministries are efforts to correct social injustices at home and abroad. The Church of the Brethren has adopted policy statements opposing capital punishment on several occasions, the last one being in 1959 at the Annual Conference. The Church of the Brethren has 200,000 members in approximately 1,000 churches.

6. COMMISSION ON SOCIAL ACTION OF REFORM JUDAISM:

UNION OF AMERICAN HEBREW CONGREGATIONS

CENTRAL CONFERENCE OF AMERICAN RABBIS

NATIONAL FEDERATION OF TEMPLE SISTERHOODS

NATIONAL FEDERATION OF TEMPLE BROTHERHOODS

NATIONAL FEDERATION OF TEMPLE YOUTH

The Commission on Social Action of Reform Judaism is composed of substantially all the Reform Jewish Congregations in the United States, numbering about 700. It is the principal federated coordinating body of American Reform Judaism. It desires to express Judaism's

centuries' old position discouraging the taking of human life by judicial process.

7. DIVISION FOR MISSION IN NORTH AMERICA OF THE LUTHERAN CHURCH IN AMERICA

The Division for Mission is an instrumentality of the Lutheran Church in America. Its object is "to inquire into the nature and proper obedience of the church's ministry within the structures of social life . . . devoting itself in particular to those aspects of the church's ministry in which individual and social needs are met as an expression of Christian responsibility for love and justice."

The 1966 biennial convention of the Lutheran Church in America adopted a social statement on capital punishment encouraging abolition of capital punishment. The Lutheran Church in America has 3,300,000 members in 6,225 congregations in the United States and Canada.

8. NATIONAL CATHOLIC CONFERENCE FOR INTERRACIAL JUSTICE

The Conference is largely a lay organization of the Roman Catholic community, devoted to interracial justice. It is a federation of human rights councils and organizations throughout the United States. Founded in 1959, it has approximately 16,000 members, who are representatives of many more Roman Catholics.

9. NATIONAL COALITION OF AMERICAN NUNS

This organization of approximately 2,000 Roman Catholic nuns is dedicated to studying, working, and speaking out on issues related to human rights and social justice. It is the largest organization of its kind.

10. NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A., DIVISION OF CHURCH AND SOCIETY

The Department of Church in Society of the Division of Church Life and Work is a part of The United Christian Missionary Society, a national unit of the Christian Church (Disciples of Christ). The Christian Church has approved two resolutions on capital punishment in its International Convention. The first resolution, approved in October 1957 at Cleveland, Ohio, stressed the need for rehabilitation of criminals and indicated that "the practice of capital punishment stands in the way of more creative, redemptive and responsible treatment of crime and criminals. The second, "Concerning Abolition of Capital Punishment," was approved in the October 1962 Assembly of the International Convention at Los Angeles, California. This resolution specifically placed the Christian Church (Disciples of Christ) on record as "favoring a program of rehabilitation for criminal offenders rather than capital punishment."

The Christian Church (Disciples of Christ) in the United States and Canada has a membership of 1,600,648.

12. THE LEADERSHIP CONFERENCE OF WOMEN'S RELIGIONS

This is a conference of all of the major superiors, as they are called, of the Roman Catholic Church in the United States. It is the most prestigious women's group of the Roman Catholic Church and numbers around 800 members, of the topmost echelons of leadership in the Church.

13. THE UNITED PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA

The United Presbyterian Church adopted a statement condemning the death penalty at its 171st general assembly in 1959 and adopted a revised statement at the 177th General Assembly in 1965.

The United Presbyterian Church in the United States of America has a membership of 3,250,000. It has 8,750 churches throughout the nation.

• • •

Petitioner and Respondent have consented to the filing of this brief.

Respectfully submitted,

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BRIEF OF AMICI CURIAE

ARGUMENT

A "MANDATORY" DEATH PENALTY VIOLATES THE EIGHTH AMENDMENT

(A) The Judicially Created Mandatory Death Penalty Is Constitutionally Suspect.

In *Furman* v. *Georgia,* 408 U.S. 238 (1972), this Court held that "discretionary" death penalty statutes were unconstitutional. The precise scope and rationale of the decision need not here detain us. Suffice it to say that following *Furman* substantially every condemned prisoner then on death row was re-sentenced to a punishment other than death. None was executed.

At first the Supreme Court of North Carolina joined in a similar course. In at least four cases, decided in 1972, post *Furman,* such action was taken. (See Brief for

Pet., p. 18, n. 17) But then, in *State* v. *Waddell,* the court took quite a different tack. North Carolina had a statute providing death for rape (N.C. Gen. Stat. §14-21) quoted on Petitioner's Brief p. 19, under which the penalty was death, unless, a proviso declared, the jury recommended life, in which case life imprisonment was to be the penalty. This statute as it stood, the Supreme Court of North Carolina held, was unconstitutional under *Furman.* But, rather than simply holding the statute void, the court declared void only the *proviso for mercy* in this statute and a similarly framed statute relating to murder. These statutes, as rewritten, thus became "mandatory" death penalty statutes for the crime of murder, rape and for "carnally knowing and abusing any female child. . . ." The rape statute as rewritten, however, was not to be applied to Waddell himself, the court ruled, but was to be applied only prospectively, from the date of that decision (January 18, 1973).

The events just related merit somber reflection. Their implications are profound. Our law prides itself on its sympathy for, and protection of, the defendant. According to long tradition, if a statute is fairly capable of two constructions, one providing a lesser penalty, and one a greater, the lesser penalty construction is to be favored. The application of this rule and similar rules is so well known it seems superfluous to cite authorities. Yet, in the case at bar the lower court has rejected this principle. Rather than striking down the death clause, it struck down the mercy clause.

This action together with similar action of the Supreme Court of Delaware in *State* v. *Dickerson,* 298 A. 2d 761 (Del. 1972), and by a number of lower courts (See Pet. Br. 21, n. 22), cannot be dismissed simply as an aberration.

Rather, it renders the penalty of death constitutionally suspect. A penalty that induces courts to distort settled humanitarian rules can scarcely be regarded otherwise.

But we are at but the first of the unusual aspects of the case: the court arrogated to itself the power, in effect, to enact a criminal statute—a power unknown to our courts for centuries. The legislature of North Carolina had not decreed that death was to be the invariant penalty for murder or rape. It was the Supreme Court of that state that by a four to three vote so declared. Early in 1974, the North Carolina legislature enacted a "mandatory" statute, but in the interval, 52 persons (Pet. Br. p. 23) were condemned to death under the judge-made *Waddell* rule.

(B) "Mandatory" Death Statutes in Fact are More Invidious Than the Discretionary Statutes Held Void in Furman.

It seems to us that this Court could well rest decision in this case on the constitutional infirmity of a judge-created death statute. But we turn to the broader question of the mandatory death statutes.

Mandatory capital punishment statutes were almost unknown in American law by 1972, having been largely replaced in the late nineteenth century. Their recent revival is unquestionably, indeed admittedly, an attempt to find a way around *Furman.*

There is no constitutional objection to curing defects in state legislation, and enacting statutes that meet standards laid down by this Court. To do so is one matter, to *seem* to do so, by enactments that do not cure the constitutional evil, and actually exacebate the wrong, is quite another. We submit that the so called mandatory

statutes fail to eradicate the evils pointed out in *Furman*. Despite the form of words, the practical consequences, as petitioner points out, and as Professor Black demonstrates, is simply to retain a discretionary system under the guise of a mandatory one. But the mandatory statutes, constitutionally, are more objectionable precisely because the discretion is hidden and therefore need not be articulated, or perhaps even thought of as discretionary decisions by the authorities. A greater evil is the potential weapon it puts in the hands of the prosecutor at plea bargaining time. For the defendant, a trial on the issue of guilt or innocence may well be secured only at the risk not of a discretionary, but of a mandatory, death sentence.

(C) The Facts in this Case Demonstrate that A Mandatory Penalty is Cruel and Unusual.

This case, like every case before this Court, presents a concrete set of circumstances. In the view of amici, these circumstances deserve close scrutiny by this Court, not, as is customary for the purpose of deciding the particular case, but rather for the grave lessons these facts teach about the death penalty.

The facts of the case at bar, set out in Pet. Br. 4-14, demonstrate with an awful clarity that a "mandatory" death penalty is indeed "cruel and unusual punishment" within the prohibition of the Eighth Amendment. Under no sane rule of law on the facts would Jesse Fowler be sentenced to death *mandatorily* for the killing of John Griffin. The men were not enemies but friends, or at least acquaintances. Griffin was contentious. July 1, 1973, was a Sunday. Fowler, Griffiin and others joined in drinking and in a morning dice game. Fowler named Griffin as one who picked up a $10 bill belonging to another player.

Griffin, making an excuse, returned the bill. In the afternoon, Fowler ran into Griffin in a tavern. Griffin berated Fowler over the bill incident. Outside the tavern Griffin knocked Fowler down, bloodied his nose and kicked him. Later Griffin asked one Jones for a pistol.

Griffin and Fowler met a third time that day. Fowler was riding in a car with one Johnny Dolby when Griffin stopped them and began to act in a threatening manner. Dolby and Fowler drove off but then Fowler returned to the scene. The details of the actual shooting related at Pet. Br. 8-10, leave unclear the exact sequence of events. After the shooting, Fowler turned himself in to the police. At the trial he admitted he had been drinking the day of the shooting. He claimed he shot in self-defense. The jury, given a choice of four verdicts, found Fowler guilty of murder.

Amici recite the facts, not because they are unusual, but because in their very "ordinariness" they demonstrate a fundamental truth. At bottom, a mandatory statute is subtly but grossly presumptuous. It is premised on the assumption that man has the wisdom to determine who shall live and who shall die, not as a judgment on a set of circumstances, and a specific defendant, but *a priori*, in terms of a general standard, supposed to cover all manner of men and murders and heedless of specific circumstances, particular defendants and ameliorating circumstances.

The case at bar illustrates the problem. Presumably the jury found that the shooting of Griffin met the North Carolina statutory standard of wilfullness, deliberateness and premeditation and, in consequence, under North Carolina law, Fowler is to die. Let us assume that *absent the death penalty*, the record is sufficient to sustain a murder

conviction and that Fowler needs to be incarcerated for the welfare of society. It does not follow that Fowler merits death. Indeed, it seems safe to say that few would call for Fowler's death for the killing of his drinking and dice playing companion, known to be contentious, and who earlier in the day had attacked him. Yet an inflexible law has decreed death for him. Mandatory statutes will gather within their folds unfortunate wretches doomed to death, not because of the heinousness of their crime, but because the legislature has decreed crimes within a prescribed rubric heinous in general.

The mandatory statutes suffer a graver defect. They presume to deprive a man of life without inquiry into the character of the man and the nature of his act. No one has examined Fowler's life, to ask what sort of person he is, what redeeming qualities he has, what prior offenses he has committed, or even how old he is. Not a single such question has been put, or even under North Carolina law can be put, to determine whether Fowler ought to die. Avenues of inquiry for rational determination are foreclosed. All such questions, under a mandatory scheme, are irrelevant. *Fowler* shows that even discretionary statutes fail the constitutional test. Statutes which abandon rational inquiry, *a fortiori,* we believe, should fall.

Amici advance the foregoing considerations, fully aware that if the penalty were other than death, all that is said above would nonetheless be true and yet society might decide for the protection of others that some persons must be deprived of their liberty for fixed, predetermined periods pursuant to imperfect laws, imperfect judges and imperfect jurors.

But the penalty of death is different. With respect to it, man's ultimate incapacity truly to judge his fellowman

assumes a special significance. The penalty of death stands apart, stark and terrible.

(D) The Death Penalty Has No Place in a Civilized Society.

Finally, these amici address themselves to the death penalty itself, apart from its particular manifestation, apart from the specifics of statutes and the case. For millennia, capital punishment has been the ultimate instrument of punishment. Its victims have numbered untold thousands, frequently drawn from a hated or feared minority. Included have been the young and the old, men and women, black and white, Catholic, Protestant and Jew. Man has devoted his energies to inventing cruelties to inflict on his fellow man. There is scarcely a mode of execution that has not been used: hanging, drawing and quartering, stoning, the gas chamber, the garrote, the guillotine, the sword, the flame, the electric chair, all have been employed. In a more primitive age, we sought openly to inflict death with barbarity. Today we pretend to refinement, priding ourselves that we can inflict death painlessly. Yet, we have but exchanged one horror for another: in place of physical cruelty we substitute an exquisite torment—the months or years that intervene between sentence and execution, while the miserable condemned man alternates between hope and fear, not knowing from stay to stay what his fate will be. Meanwhile, we confine the prisoner in a special section of the prison close by the house of death, deprive him of work, and treat him, still a living human being, as if in a sense, already dead.

However terrible the tortures we inflict on powerless wretches, perhaps more terrible is what we do to ourselves. Today we are appalled at the crimes once thought

worthy of the death penalty. There were hundreds of offenses so punished. At one time the extreme penalty was imposed for adherence to the wrong creed, or even for supposed doctrinal error. But we have our own category of crimes for which we insist a man must forfeit his life. A later age may find our views as wrong as we regard those of a prior age. Yet we, in our hubris, seek to deny a human being of the gift that God alone has given to him—life itself.

Through capital punishment, we cheapen human life and thus demean ourselves. Who are we, frail creatures, subject to hates, enmity, prejudice, passions and fears, to decide which of us is fit to live and which fit to die? Every human endeavor is imperfect, every judge, every juror, every prosecutor, every defense counsel but a mortal man, prone to error. In the very hour when we feel surest of the righteousness of our judgment, we may commit the gravest evil.

The true answer to killing and brutality in our land is not killing and brutality inflicted by the collective—by us as the State. The law is a potent teacher, but the lessons it teaches are not the ones we want learned. If the law teaches death for death, or worse, death for crimes less than death, the law teaches savagery masking in the name of justice.

If this Court turns away from the death penalty, then we may learn to deal rationally with transgressors. To do so undoubtedly will prove extraordinarily difficult. The problem of crime involves a subtle interplay of economic, social, moral and perhaps biological factors. The search will be arduous because we today can no longer accept the simplicities of a by-gone era. But this we can say with confidence: We err sadly if we think that we can

cure, or even ameliorate the problem by putting men to death. Centuries of experience have demonstrated the ineffectiveness of such a course. And if we do put human beings to death, we know who they will be: they will be the poor, the blacks, the friendless, the ignorant, and the forgotten.

If, however, we turn away now, and hopefully forever, from the death penalty, we will have the opportunity to face the real problems of crime. Solutions may be slow in coming. We have to right many ancient injustices. We may have to open the door of opportunity to all. We may have to believe in morally better ways. We may have to practice the precepts of religion.

Only a few days ago, Great Britain, despite the provocation of terrorist attacks refused to reinstate capital punishment. We should follow a similar course.

Answers to the problems of crime may elude us. But if we seek the answer in life, not in death, we will have fulfilled our duty as responsible human beings and, in so doing, will have fulfilled our responsibility to our Creator.

This Court often has served the noble function of being the conscience of our nation. It has not hesitated to grapple with social issues not capable of resolution in any other branch of government and to deal with them in decisive fashion, and by so doing, elevating the moral tone of our country. The case at bar provides a signal opportunity for this Court once again so to act.

CONCLUSION

Over the past decade the major religious organizations of the United States have declared their opposition to the death penalty. Many of these declarations were printed in full text in the brief for the amici religious organizations in *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968) (Oct. term 1967, No. 1015). Amici, with countless others, believed with *Furman* that the great scourge of the death penalty was lifted forever from America. Tragically, many have chosen to seek ways to thwart that humane decision, and to put back into use the electric chair and the rope and the gas chamber. Presently 361 human beings—the number increases constantly—suffer the agony of death row.

For eight years no one has been put to death in the United States. We have been spared the agony of the frantic last minute appeals for stays and commutations and the ghastliness of executions. We urge this Court to declare that the death penalty no longer has a place in American life.

It is not only Jesse Thurman Fowler that stands at the bar of this Court. It is a barbarism that ought to be banished from our lives. We ask that the death penalty be held offensive to the Constitution.

Respectfully submitted,

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